IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

State of Oklahoma, Plaintiff, vs. Tyson Foods, Inc., et al., Defendants.	**Case No. 4:05-cv-00329-GKF-PJC**

DEFENDANTS' REPLY IN SUPPORT OF
MOTION REGARDING SUMMARY JUDGMENT BRIEFING

Several of the points Plaintiff makes in its response concerning the scheduling of summary judgment motions merit brief reply before the parties' anticipated conversation with the Court on this issue.

Plaintiff's proposed "accommodation," which would permit the Defendants a total of only eight summary judgment motions, overlooks the fact that each of the 13 Defendants is already entitled to file at least one summary judgment motion on its own behalf. See LCvR 56.1(a) (providing that "each party may file . . . one motion" without leave of court and that additional motions for a party may be filed with leave). Plaintiff elected to sue 13 separate defendants in this case, and each of those Defendants has borne the expense of defending itself. Plaintiff served separate discovery on each of these 13 defendants, and each of those Defendants has borne the burden of responding to that discovery. There can be no doubt that there are 13 "parties" on the defense side of this

case, each of which is entitled to file at least one summary judgment motion under the Federal Rules of Civil Procedure and the Local Rules. Thus, the Defendants are presently entitled, as a matter of right and without leave of the Court, to bring 13 summary judgment motions.

The question raised by the present motion is whether the extraordinary nature and scope of this litigation suggests that the efficient course of the litigation would best be served by the granting Defendants leave to file an additional three summary judgment motions to address some of the complex issues raised by Plaintiff's claims. Although Plaintiff's response pays lip service to "accommodating" the unusual needs of the case, Plaintiff's proposal would actually *reduce* the number of permitted summary judgment motions from the current 13 to eight and reduce the number of pages Defendants may submit to support their motions from 300 to 145. Plaintiff offers neither legal authority nor sound reasons for such a reduction, and Defendants will not consent to such a truncation of their rights.

Plaintiff's repeated emphasis on the proceedings in the City of Tulsa case is misplaced. Although both City of Tulsa and the case here involve poultry litter, the two cases could not be more different in factual and legal scope. The present case involves more defendants, more counts, more legal theories, more forms of requested recovery, and hundreds of thousands more documents than the City of Tulsa case. As the Court is aware from the hearing on Plaintiff's motion for a preliminary injunction, Plaintiff's case is based entirely on what it characterizes as multiple "lines" of expert proof. The

Plaintiff's multiple, complicated expert theories have prompted the parties to retain approximately 50 different experts among them.

Moreover, Plaintiff's claims rest on an unusual number of novel theories, including Plaintiff's claims that:

- The million-plus acre Illinois River can be a single CERCLA "facility";
- Organophosphates are a "hazardous" substance under CERCLA;
- RCRA applies to the state-permitted land application of poultry litter;
- Poultry litter applied in conformance with state-issued permits can constitute a public nuisance; and
- Remote parties can be liable for purported violations of state regulations governing poultry litter applicators.

When these novel issues are coupled with federal preemption and preclusion, public and private nuisance, trespass, unspecified equitable remedies, and the interpretation of state regulations, it becomes clear that Plaintiff's claims present an unusually large number of challenging legal issues.

Contrary to Plaintiff's assertions, Defendants do not propose a "shotgun" approach to summary judgment. In fact, Defendants propose the exact opposite. By consolidating the motions that present issues common to the multiple defendants in this case, Defendants will present the Court with a complete statement of authorities on each issue of law. Defendants submit that this approach will assist the Court, as the Court will need to address and resolve each of these legal issues eventually. And, inasmuch as the Court's rulings on the issues will significantly affect how the parties prepare for trial,

Defendants submit that a robust summary judgment practice is the most efficient way of addressing them.

Plaintiff's effort to restrict Defendants' *individual* summary judgment motions is also troubling. As the Court is aware, throughout the course of this litigation, where Defendants have had common positions on discovery or legal issues, they have voluntarily submitted motions or responses jointly. Defendants have employed this consolidated briefing in recognition of the advantages and efficiencies to both the Court and the parties of such joint submissions. Indeed, Defendants' own summary judgment proposal here reflects Defendants' intent to make such joint submissions again to the extent possible. Nevertheless, different Defendants unquestionably stand in different positions with respect to certain issues, both legal and factual, and the Court has never *forced* the Defendants to file joint submissions at the expense of those individual positions.

Plaintiff's proposal, however, seeks to do just that. It would force each Defendant to devote the great majority of its permitted pages of argument to issues common to all Defendants, while reducing the argument that each Defendant could offer concerning Plaintiff's claims against it individually from 25 to 10 pages. This proposed reduction of the space Defendants can devote to defendant-specific arguments by 60%—from 25 to 10 pages—is particularly troubling. In Defendants' view, one of the greatest weaknesses of Plaintiff's case is its utter lack of Defendant-specific proof for any of its claims. The present action is not, after all, a defense class action or a market-share liability case. Plaintiff asserts *individual* claims against *individual* Defendants, and must offer

individual proof. Each Defendant is entitled to contest the legal sufficiency of that proof through summary judgment motions. Under Plaintiff's proposal, each Defendant would have in effect a single page to address each of Plaintiff's ten claims against it, an amount clearly insufficient to present the undisputed facts and law for the Court's consideration.

Plaintiff's demand that Defendants be required to file all summary judgment motions at one time on a single day less than four months before trial also runs Counter to standard practice and the Federal Rules of Civil Procedure. Rule 56(b) states that a defendant may move "at any time" for summary judgment, subject of course to whatever deadlines the district court may in its discretion impose. Defendants' right to file summary judgment motions well in advance of trial is granted by the express language of Rule 56(b), and defendants have no interest in waiving that right. The fact that Plaintiffs would prefer to receive all summary judgment motions at one time is immaterial. Plaintiff offers no legal authority for its demand that Defendants file all summary judgment motions at one time, and the Court should reject that demand.

Finally, Defendants do *not* seek to force the Court to hold a series of hearings on summary judgment motions between now and the summer of 2009. Rather, Defendants seek to avoid the very logjam that Plaintiff proposes. It will not be helpful to the Court if all of the parties' briefing on all issues is submitted in one lump. Accordingly, Defendants suggest that the submission of these motions serially, instead of in one great mass at the end, (1) would give the parties more time to present the Court with higher quality responses and replies and (2) would permit the Court, *if it wishes*, to group the motions and to address some of the threshold legal issues earlier in the process. Of

course, the Court need not schedule oral argument on any matter where the Court believes such argument would not be helpful.

Defendants look forward to discussing these procedural issues with the Court and Plaintiff's counsel at the Court's convenience.

Dated: February 3, 2009

Respectfully submitted,

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